MALAYSIAN REPORTS

T. CHELLAPAH v. OFFICIAL ASSIGNEE

[F.C. (Azmi L.P., Suffian and Gill F.JJ.) August 14, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. 11 of 1970]

Bankruptcy — Proof of debt — Rejection of claim — Claimant an unlicensed moneylender — Bankruptcy Rules, 1969, r. 26 — Bankruptcy Ordinance, 1959, s. 15.

Moneylenders — Whether person is a moneylender — Presumption from lending of money in consideration of a larger sum being repaid — Moneylenders Ordinance 1951, ss. 2, 3 & 15.

In this case the official assignee rejected the claim of the appellant as he concluded on the evidence that he was a moneylender and did not have a moneylender's licence. The appellant applied by motion for an order to reverse the official assignee's decision. The application was dismissed in the High Court ([1970] 1 M.L.J. 220) and the appellant appealed.

Held, dismissing the appeal: the onus in this case was on the appellant to rebut the presumption raised under section 3 of the Moneylenders Ordinance from the fact that he had lent money to the debtor at interest and as the appellant had failed to discharge this onus the application was rightly dismissed.

Cases referred to:-

(1) *Chow Yoong Hung* v. *Choong Fah Rubber Manufacturing* [1962] M.L.J. 74, P.C.

(2) *Sathu Singh* v. *Sellathurai* [1955] M.L.J. 117.

The following cases were also cited in argument: *Nash* v. *Layton* [1911] Ch. 71; *Marshall* v. *Goulston Discount (Northern) Ltd.* [1967] Ch. 72; *Litchfield* v. *Dreyfus* [1906] 11 K.B. 584, 589; *Raju Ria* v. *Lian Kim Lian* [1965] 1 M.L.J. 98, 128, 129, C.A.; *Teng Ah Seah* v. *Teh Choo Peng* (1956) 2 M.C. 253; *Isaac* v. *Lourdu* (1961) 3 M.C. 298; *Ismail Sahib* v. *Nordin* [1951] M.L.J. 98.

FEDERAL COURT.

G. Vadiveloo for the appellant.

E. E. Sim (Official Assignee) in person.

Cur. Adv. Vult.

Suffian F.J. (read by Gill F.J.): Thirunaman s/o Vairamuthu (the debtor) had a wage-earner's administration order made against him on 22nd November, 1962.

He filed his statement of affairs on 28th November, 1962, in which he disclosed gross unsecured liabilities amounting to $7,866 due to 12 creditors.

The appellant was disclosed as a creditor in the statement of affairs to the extent of $1,000. He filed his proof of debt with the official assignee on 13th December, 1963, claiming a sum of $1,565 as follows:

Principal due on demand note dated 3.5.56	...	$1,000
Interest thereon from 3.3.58 to 22.11.62 at 12% per annum		565
Total	=	$1,565

Rule 26 of Schedule C to the Bankruptcy Act, 1967, reads as follows:

"The Official Assignee shall examine every proof and the grounds of the debt, and in writing admit or reject it in whole or in part or require further evidence in support of it. If he rejects a proof he shall state in writing to the creditor the grounds of the rejection."

Accordingly, the official assignee, who is the respondent here, proceeded to examine the appellant's proof. On doing so he found that the note on which the claim is based, carried interest at the rate of 12% per annum and that no note or memorandum executed by the parties in accordance with section 16(1) of the Moneylenders Ordinance No. 42 of 1951 had been produced.

The official assignee thereupon wrote a letter dated 22nd August, 1969, asking the appellant to produce his moneylender's licence and the memorandum or note to the contract.

The appellant, in his reply dated 28th August, 1969, admitted that he was not a licensed moneylender. He also admitted receiving a total of $220 as interest on the note. But he claimed that section 16 of the Ordinance did not apply to him because he was not a habitual moneylender and this loan was a friendly loan to a member of his (Tamil) community.

Subsequent investigations by the official assignee into the affairs of two other bankrupts, a Mr. T. Kasipillay and a Mr. Ramakrishnan son of Ramasamy revealed that the appellant had also proved in two other bankruptcy matters. In the case involving Mr. Kasipillay it was discovered that he had on 30th June 1959 executed an On Demand Note for $2,600 at 18% interest in favour of the appellant. In the case of Mr. Ramakrishnan he had on 1st February, 1963 executed an I.O.U. for $374.50 at 12% interest in favour of the appellant. Taking these two transactions into account, the official assignee concluded that the appellant was a moneylender within the meaning of the Moneylenders Ordinance and as he did not have a Moneylender's licence under section 6, his claim was rejected under section 15.

The material part of section 2 defines a moneylender as including "every person whose business is that of money lending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business ... but does not include ... any person ... *bona fide* carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money ..."

Section 3 provides:

"... any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender."

Section 15 provides:

"No contract for the payment of money lent after the coming into force of this Ordinance by an unlicensed moneylender shall be enforceable."

The appellant was dissatisfied with the official assignee's decision. On 20th September, 1969, he applied by way of motion for an order to reverse the official assignee's decision. The motion was accompanied by an affidavit in which he said:

"I am not and have never been a habitual moneylender nor carried on money lending as a business. I have known the bankrupt and his family for a long time and my purpose in lending the sum of $1,000 was purely to help him and his

family. I am a certified and public accountant by profession and have been so practising for the past 18 years."

His motion came up before Raja Azlan Shah J. on 12th January, 1970, and on 21st January, 1970, he dismissed the application.

The appellant has appealed to this court.

I am of the opinion that this appeal should be dismissed.

The question here is, was the appellant a moneylender within the meaning of the Ordinance? If he was, then the decision of the official assignee was right. The Privy Council has pronounced on the effect of the presumption under section 3 (which does not exist in the equivalent English legislation) in *Chow Yoong Hong* v. *Choong Fah Rubber Manufactory*.[1] Delivering the advice of their Lordships, Lord Devlin said at page 77:

> The effect of [section 3] has been considered by Thomson J. (as he then was) in *Sadhu Singh* v. *Sellathurai*[2] in a judgment which their Lordships respectfully approve and adopt. To lend money is not the same thing as to carry on the business of money lending. In order to prove that a man is a moneylender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his money lending transactions. If he were left to discharge this burden without the aid of any presumption, a defendant might frequently be in a difficulty. He might have had only one or two transactions with the moneylender and he might find it difficult to obtain evidence about the business done by the moneylender with other parties. Section 3 enables a defendant to found his claim on proof of a *single* loan made to him at interest, it being presumed, in the absence of rebutting evidence that there were sufficient other transactions of a similar sort to amount to a carrying on of business."

It will be seen that proof of a *single* loan made to the debtor at interest raised a presumption that there were sufficient other transactions of a similar sort to amount to a carrying on of the business of money lending by the appellant.

Before Raja Azlan Shah J. the appellant gave no evidence and called no witnesses to rebut this presumption. To do that he depended solely on his affidavit. I think that it was for him to satisfy the learned judge that the official assignee was wrong. As he gave no evidence and called no witnesses, the learned judge was right to uphold the official assignee's decision.

Before us Mr. G. Vadiveloo for the appellant argued that it was unnecessary for the appellant to rebut the information contained in the memorandum submitted by the official assignee to the registrar under rule 183 of the Bankruptcy Rules, 1969. That information was to the effect that the appellant had subsequent to the loan to the debtor made the two other loans already mentioned.

Rule 183 reads:

> "The Official Assignee shall, within three days after receiving notice from a creditor of his intention to appeal against a decision rejecting a proof, file such proof with the registrar with a memorandum thereon of his disallowance thereof..."

Mr. Vadiveloo conceded that a copy of the memorandum had been sent to him by letter dated 19th November, 1969 (that is, several days before the hearing of the application). In my view, the onus was on him to rebut the presumption against his client by such evidence as would convince the learned judge. He failed to discharge that onus.

Moreover, apart from the single loan made to the debtor in 1956 there were the two subsequent loans. It is true that one of these was made in 1959 and the other in 1963; but I do not think that they were too remote in point of time from the loan to the debtor to be left out of consideration. They were rightly taken into account when determining the question whether or not the appellant was a moneylender.

With respect the learned judge was right to dismiss the motion.

Azmi L.P. and **Gill F.J.** concurred.

Appeal dismissed.

Solicitors: *D. P. Xavier & Co.*

TUNKU ABDULLAH v. ALI AMBERAN

[F.C. (Azmi L.P., Suffian and Gill F.JJ.) August 14, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. 13 of 1970]

Elections — Election petition — Appeal — Final Order — Whether decision of Election Judge may be appealed against to the Federal Court — Federal Constitution, art. 118.

The appellant sought to appeal from the decision of the Election Judge ([1970] 2 M.L.J. 15) against the finding that he was guilty of corrupt practice and against the award of costs against him.

Held, dismissing the appeal: the final order of an Election Judge is unappealable and therefore the Federal Court had no jurisdiction to entertain the appeal.

Cases referred to:-

(1) *Devan Nair* v. *Yong Kuan Teik* [1967] 1 M.L.J. 261.

(2) *A.J. Arzu* v. *A.E. Arthurs & Anor.* [1965] 1 W.L.R. 675.

(3) *Sennayake* v. *Navaratne* [1954] A.C. 640.

(4) *Re Perting Timor Election* [1962] M.L.J. 333, 334.

The following cases were also cited in argument: *In re Chinery* 12 Q.B.D. 342, 345, 346; *Onslow* v. *Inland Revenue* 25 Q.B.D. 465; *Haslam Foundry* v. *Hall* 20 Q.B.D. 491, 393; *N.P. Ponnuswamy* v. *Returning Officer Namakkal Constituteney* [1952] S.C.R. 218; *Durga Shanker Meta* v. *Reghuraj Singh* [1955] S.C.R. 267; *Kennedy* v. *Purcell* (1888) 59 L.T. 279.

FEDERAL COURT.

Dato Athi Nahappan for the appellant.

O. L. Phipps (*A. Rajadurai* with him) for the respondent.

Ajaib Singh (Senior Federal Counsel) held watching brief on behalf of Election Commission.

Cur. Adv. Vult.

Suffian F.J. (read by Gill F.J.): The question for decision here is whether or not the decision of Raja Azlan Shah J. sitting as an Election Judge nominated by the Chief Justice under section 33(1) of the Election Offences Act, 1954, may be appealed against to this court.